SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 745

CENTRAL GREYHOUND LINES, INC., OF NEW YORK,

Appellant,

vs.

CARROLL E. MEALEY, JOHN F. HENNESSEY AND JOSEPH M. MESNIG, CONSTITUTING THE STATE TAX COMMISSION OF THE STATE OF NEW YORK.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

NATHANIEL L. GOLDSTEIN,
Attorney General of New York.
WENDELL P. BROWN,
Solicitor General,
JOHN C. CRARY, JR.,
Assistant Attorney General,
Counsel for Appellee.

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Respondents-Appellees

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

MAY IT PLEASE THE COURT:

Now come the appellees in the above entitled cause by their counsel of record and submit their statement in opposition to jurisdiction and move that the appeal herein be dismissed or that the order and judgment appealed from be affirmed.

Statement

This is an appeal from an order and judgment of the Court of Appeals of the State of New York embodied in its

Remittitur, dated July 23, 1946, as amended upon motion of the appellants by order dated October 15, 1946. That Court unanimously affirmed an order of the Appellate Division of the Supreme Court, Third Judicial Department, which confirmed a final determination of the appellees, comprising the State Tax Commission. The proceeding is in the nature of certiorari under Article 78 of the New York Civil Practice Act brought to review appellees' determination affirming assessments of taxes under Section 186-a of the New York Tax Law.

Appellant is a common carrier engaged in transporting passengers by omnibus. The statute involved imposes an emergency tax of two per cent of gross income on any utility doing business in the State which is subject to the supervision of the State Department of Public Service. The definition of gross income includes "receipts received in or by reason of any sale • • • made or service rendered for ultimate consumption or use by the purchaser in this state".

The controversy is concerned only with taxation of that part of appellant's receipts which is derived from continuous transportation of passengers between points in New York State where part of the route traverses other States. The regular route of appellant's buses from New York City to Buffalo and other points in upstate New York crosses parts of New Jersey and Pennsylvania. Application of the tax to receipts from transportation moving entirely within the State is not contested and transportation which does not both originate and terminate within the State has not been taxed. There is no dispute as to the proportion of mileage within and without the State. The controversy relates to operations for the month of July, 1937, selected as a test period by agreement of the parties (Court of Appeals Record, fols. 85-86). As to that month

it was agreed that 57.47 per cent of the total mileage of the journeys concerned was traversed within the State of New York, and 42.53 per cent thereof was traversed without the State (Record, fols. 163-164).

Review by this Court is now sought upon assignments alleging error upon the part of the Court of Appeals in holding that there was no constitutional objection under the interstate commerce clause to taxation of that part of the total receipts attributable to mileage without the State of New York, and in holding that Section 186-a of the Tax Law, construed as applying to appellant's entire income from the transportation involved, is valid. The constitutional issue thus sought to be raised was not directly or necessarily passed on by the Court of Appeals.

The petition of appellant in the New York Supreme Court alleged that construction of the statute as applying to its total receipts from the trips involved was contrary to the statute and unconstitutional, and further, that the assessment of taxes was void in that it did not eliminate the income from services "consumed and used" within the States of New Jersey and Pennsylvania. However, upon transfer of the case to the Appellate Division of the Supreme Court for disposition in the first instance, pursuant to Civil Practice Act, Section 1296, petitioner's argument centered itself upon the construction of the statute. The contention was that the general language with respect to utility services "consumed or used" in the State did not reach any bus transportation going partly outside the State, even though between two points therein, and could at most be applied only with respect to that part of the journey which traversed the State. Doubts as to the constitutionality of taxing the entire receipts under the interstate commerce clause were put forth as lending weight to the construction argument and, more particularly, as requiring

the decree, decedent's Reno attorney was advised that one of respondent's attorneys had received reinstatement of this previously revoked authorization. For what purpose these facts have now been recited for the first time is open to conjecture. Certainly they have no bearing upon the case as now presented. The fact remains that *no appearance was ever entered by the respondent in the divorce action which had been instituted against her by the decedent in Reno, Nevada (Amendment to Report of State Referee, par. 5, Rec. p. 7), (See also Rec. p. 46).*

For a proper consideration of this case the following facts should be added to the statement of the case contained in petitioner's brief, pages 2-4.

When the decedent discontinued his automobile business in New Haven in 1942 all of the equipment which was not sold or leased was stored in the decedent's residence in Woodbridge. (Rep. of State Referee, Par. 2, Rec. p. 5.)

The bulk of the large units were stored in the Woodbridge home and a few items were leased. (Rec. p. 133.)

Excepting for parts which had to be used, all of the rest of the equipment, tools, hoists, etc. were either stored in the Woodbridge home or leased. (Rec. p. 142.)

During the period that the decedent was employed in Springfield Mass., down to the time of his departure for Reno in March 1944, he told the respondent and others that his job in Springfield was a temporary one, and that when the war was over he intended to return to Woodbridge and reopen his automobile business. He also retained his home in Woodbridge during all of that period. (Rep. of State Referee Par. 3, Rec. p. 5.) (See also Rec. pp. 64, 76, 77, 84, 87, 126, 133, 138.)

During the period that Mr. Rice was in Springfield, the respondent on many occasions visited him in Springfield where they both

occupied the same room in the Hotel Kimball, and all registrations in the hotel register save one or two when respondent arrived first, on said occasions were in the handwriting of Mr. Rice, giving his home residence as Woodbridge, Connecticut. (Rec. pp. 90-93.)

In February, 1944, decedent told the petitioner that he had consulted an attorney in Springfield who *told* him to go out to Reno to get a divorce. (Rec. p. 173.)

Before leaving for Reno, Nevada, Mr. Rice notified petitioner that if he secured his divorce in Nevada, he would notify the petitioner by a code telegram and would ask her to marry him. (Rec. p. 174.)

After Mr. Rice left for Reno, Nevada, in March, 1944, the respondent received each week by mail from Springfield, Mass., for a period of six successive weeks, a check for $15.00 signed by Mr. Rice, each check being dated March 16, 1944. (Rec. pp. 109, 110.)

When Rice went to Reno in March, 1944, he went there for the sole purpose of obtaining a divorce from the respondent. (Amdt. to Rep. of State Referee, Par. 5, Rec. p. 7; see also Rec. pp. 51, 162, 173, 175.)

During the period that Rice lived in Reno, he lived in a rooming house which he had rented by the week, and he obtained a job at war work in Reno, which job he resigned on July 2, 1944, the day before he and the petitioner were married. (Rep. of State Ref. Par. 6, Rec. p. 6.)

Before obtaining his divorce decree on June 13, 1944, Rice told his attorney in Reno that he had made application to the Army Employment Agency for a job, and asked his attorney if it would be all right for him to take such a job at Herlong, Cal., and was told that it was perfectly all right to do so. (Rep. of State Ref. Par. 6; Rec. p. 6; see also Rec. p. 52.)

On July 15, 1944, the decedent and the petitioner went to Herlong, Cal. where Rice obtained a war job. After moving to Herlong he continued to pay rent for the room in Reno, Nevada, but at a reduced rate per week. (Rec. p. 167.)

This rented room was a bedroom about 10 feet x 12 feet or 12 feet x 14 feet in size. (Rec. p. 196.)

During Rice's absence in Herlong, Cal., this rented bedroom in Reno was occupied by others and the door to the same was not locked. (Rec. pp. 168-170.)

At infrequent intervals and not every week Rice and his new wife occupied said rented bedroom in Reno occasionally on week ends. (Rec. p. 168.)

The reason why Rice continued to pay rent for the room in Reno was because he did not know whether his job in Herlong, Cal., would be permanent, or whether he and his wife would like it there, and if they did not like it they intended to return to Reno. (Rep. of State Referee Par. 7; Rec. p. 6); (see also Rec. p. 181).

Argument

The sole question presented in this case is whether the decedent, Rice, had a bona fide domicil in the State of Nevada at the time he secured his divorce from the present respondent. It would appear that all parties are in accord that the decision of this court in the case of *Williams* vs. *North Carolina*, 325 U. S. 226; 65 S. Ct. 1092, is the controlling case on the issues presented, and that the parties agree that the State of Connecticut had jurisdiction to go into the question of domicil and determine the above question.

The cases of *Sherrer* vs. *Sherrer*, 334 U. S. 343; 68 S. Ct. 1087 and *Coe* vs. *Coe*, 334 U. S. 378; 68 S. Ct. 1094 have in no way changed the law as laid down in the second of the *Williams* cases. These two cases merely state that where a defendant in a divorce

action in a foreign state has submitted to the jurisdiction, either by contesting the case or by merely entering an appearance through counsel and then not contesting, he or she is thereafter precluded from litigating the question of domicil in any court.

Whether the defendant wavers in arriving at a decision as to entry of appearance has no bearing on the matter. The only question is whether an appearance through counsel or otherwise was ever entered in the foreign jurisdiction.

In this brief we will attempt to take up consecutively the alleged errors relied upon by the petitioner which are six in number and are set forth on pages 4 and 5 of her brief.

I

The Ultimate Conclusion of the Connecticut Court is Supported by Evidence That Was Material and Relevant

Petitioner claims that all evidence admitted in the case concerning the relations between the respondent and her husband from the time of their marriage until the decedent left for Nevada in March, 1944, and especially with reference to the time subsequent to the date in September, 1942, when the decedent left Connecticut to work in Springfield, Mass., was irrelevant and immaterial.

Petitioner, in her brief (pp. 6, 7) refers to a number of cases in which a foreign divorce was held to be invalid because of lack of domicil. In all of these cases one of the most important facts was that the party securing the foreign divorce shortly thereafter returned from the foreign jurisdiction to the previously existing home state, or as in the case of *Esenwein* vs. *Pennsylvania*, 325 U. S. 279; 65 S. Ct. 1118, went to a third state shortly after securing the divorce.

Petitioner's brief then pursues a most unique line of argument to the effect that because of the facts in these particular cases the

rule must be that the only evidence material in proving a lack of domicil is evidence which arises after the change of residence.

We agree that in all of these cases referred to by petitioner the fact of an almost immediate return to the original domicil would carry tremendous weight in disproving a bona fide intention to acquire a new domicil, *but it by no means follows that such evidence is the only evidence that is material on the question of intention.*

Assume that a party is leaving his home state for Reno, Nevada, to secure a divorce, and has stated to various people up to the very moment his train departs that he intends within a short time to return to his former home. Upon arrival in Reno, however, after securing legal advice, he states to every one he meets that he intends to make Nevada his permanent home. Does petitioner contend that all evidence of his statements prior to boarding the train are irrelevant and immaterial in attacking the credibility of his later statements? We hardly believe that such a claim will be very forcibly pressed.

Petitioner's brief, page 8, further proceeds to cite certain cases where a foreign divorce was held to be valid and domicil properly proven. In *Dalton* vs. *Dalton*, 270 App. Div. 269; 59 N. Y. Sup. 2nd 68 the evidence discloses that the husband had lived continuously in the State of Illinois for four years before instituting divorce proceedings there and all of the evidence was adequate to prove that he had definitely established his domicil in Illinois. Having established this new domicil, it is important to read that portion of the opinion on page 71 of the latter citation which gives consideration to the fact that the party domiciled in Illinois went to another State.

> "Temporary residence in the District of Columbia for an indefinite period while in government service is not ordinarily enough in and of itself to deprive the federal employee of his domicil of origin."

This case is strong authority in support of respondent's claim that Rice's original domicil in Connecticut was never destroyed by his temporary employment in government service in Reno, Nevada, or later in Hemlong, Cal.

To the same effect is the case of *Commonwealth* vs. *Berfield*, 160 Penn. Super. 138, where lack of domicil was found. In that case a former resident of Pennsylvania secured a Florida divorce decree on April 17, 1945 and did not return to his home state of Pennsylvania until August 22, 1945. At page 449 of the opinion, the Court says, "Profitable *employment in war work and not domiciliary intent* kept him in Florida until that date."

In *Baldwin* vs. *Baldwin*, 28 Cal. 2nd 406; 170 Pac. 2nd 670 there were many facts to support the claim of domicil which petitioner significantly omits from her brief. For instance the defendant in that case, on July 31, 1939, moved all of his personal effects to Nevada; thereafter he resided continuously in Nevada down to October 13, 1939, the date when his complaint for divorce was filed, and continued to reside there thereafter until July 10, 1944. During all of the first period referred to, he opened a bank account in Nevada, he rented a safe deposit box there, he paid his personal property taxes there, he registered to vote and voted there; he registered under the selective service act as a resident of Nevada, he registered his automobile in Nevada, he filed his income tax returns there, and participated in many civil and political affairs.

We heartily agree that there was a case where domicil was adequately proven, but we do not agree that this case, any more than any of the others cited, justifies the contention that in the case before us no evidence should have been admitted as to Rice's statements or conduct prior to his boarding the train for Nevada, only a day or two before arriving there and immediately consulting a Reno lawyer regarding divorce.

In the case of *Estin* vs. *Estin*, 63 N. Y. Sup. 2nd. 476, the subordinate facts again were strong enough to justify a conclusion that a change of domicil had been accomplished.

The case of *In re Paul's Estate*, 135 Pac. 2nd. 284 is cited by the petitioner as one in which the facts were "strikingly similar to the case at bar." Petitioner neglects, however, to recite many of the subordinate facts which are far from similar to the case before us. For instance in that case the party before leaving his home sold his business there. He also took with him to Nevada all of his personal belongings. Before leaving he told his former partner inbusiness that he was going to look for a business location outside of his home state of California. After arriving in Nevada, he wrote his first wife that he liked Reno and that the business possibilities there were good, and that he was looking for a building in which to set up his business.

It is interesting to note how the appellate court passed upon the question of domicil. The opinion at page 287 reads as follows:

> "The evidentiary facts relied upon by appellant, together with the inferences in her favor therefrom, merely serve to create a *conflict in the evidence* and under such circumstances, the court *findings cannot be disturbed.*"

Intention is a state of mind. Here the party whose state of mind we are trying to determine is deceased. Are his statements to his frineds and associates, almost down to the time of his departure from Springfield, to be utterly ignored? Have we no right to consider that he left under lease in Connecticut some of the assets of the corporation in which he was vitally interested and stored in his home in Connecticut the bulk of the large units? Are we to ignore the fact that he left other personal belongings and clothes in this home in Connecticut and never sent for them up to the time of his death? Are we to ignore the fact that almost down to the time of his departure for Nevada, he had been on amicable terms with his wife, and had stayed with her in his home in

Connecticut, and had received visits from her in Springfield, without expressing any intention other than one to eventually return to his home in Connecticut? Are we to ignore many other equally important subordinate facts concerning decedent's actions before departing for Nevada, all of which throw considerable light on his state of mind?

One of the grounds for offering some of the foregoing evidence was in support of the allegations of paragraph 3 of respondent's complaint alleging that Mr. Rice had retained his Connecticut domicil during all of the period during which he was in Massachusetts, which was denied in petitioner's answer. The fact that petitioner's counsel, at some period in the trial of the case, realized his tactical error in pleading in a manner that weakened his case, and stated his willingness to admit this paragraph, has no bearing. We were entitled to try the case as it was set up in the pleadings and to have the benefit of any inferences fairly to be drawn therefrom.

Actually much of this evidence was offered and admitted for the general purpose of showing that Rice's residence and domicil continued in Connecticut to the date of his death and that he never acquired a residence in Nevada. (Rec. pp. 57 and 58.) It was also offered and admitted as bearing on the probability that Rice did or did not abandon his domicil in Connecticut as the law requires and adopt as the law requires a new domicil elsewhere. (Rec. p. 95.)

It was for the trial court to determine what weight should be given to this evidence, but we can conceive of no court, even in the State of Nevada, that would rule that such evidence was immaterial and irrrelevant on the question of intention and therefore inadmissible.

II

Abandonment of Former Domicil is a Necessary Element in Proving Change of Domicil

Petitioner claims that the Connecticut Supreme Court was in error in adopting its prior opinions in the cases of *Morgan* vs. *Morgan*, 103 Conn. 189; 130 Atl. 254 and *McDonald* vs. *Hartford Trust Co.*, 104 Conn. 169; 132 Atl. 902.

In *Restatement of the Law, Conflict of Laws, Sec.* 23 the proposition is laid down that a domicil once established, continues until it is superseded by a new domicil.

In the *Morgan* case the court, after so stating the law, concluded that "proof of the acquisition of a new domicil of choice is not complete without evidence of the abandonment of the old." Certainly no fault can be found with such a statement. It is true that to effectuate a change of domicil a party must prove a present intention of remaining there permanently. The foregoing quotation from the *Morgan* case means nothing more than that satisfactory proof of a present intention of remaining permanently in a new home is not complete unless there has been some evidence presented of an intention to abandon the former home. The *McDonald* case merely points out that even though one has left a former home and has no intention of returning there, the former home still remains the domicil until a new one has been acquired.

In the case before us petitioner did present some evidence to the effect that Rice never intended to return to Connecticut. The Connectnicut court has nowhere rested its decision on any failure to present any such evidence. The *Morgan* case and the *McDonald* case are merely cited to show that such evidence alone is not sufficient to prove a new domicil. In other words, no matter what Rice's intention may have been as to never returning to Connecticut, he still, as a matter of law, had not abandoned his Connecticut domicil until he had acquired a new one elsewhere.

III

The Connecticut Court Did Not Shift the Burden of Proof Onto Petitioner

Petitioner complains of the language of the Connecticut Supreme Court (Rec., p. 214) to the effect that the "attack upon the quoted finding of the Referee cannot succeed unless the subordinate facts are sufficient to establish as a matter of law that Rice had acquired a new domicil in Nevada," and argues that this is tantamount to a shifting of the burden of proof from the plaintiff to the defendant.

If we turn to page 213 of the Record we find that the finding of the Referee, which was under attack by the present petitioner, was the final paragraph of his report that, "Rice never established a home in Reno. He intended to do so in the future if he did not like it at Herlong, but did not have an unqualified intention to make a home there at present and Reno was not his bona fide domicil." The opinion then goes on to point out that this paragraph was "a conclusion drawn from the subordinate facts and inferences therefrom. In order to be sustained, it must have been logically drawn from these facts without violation of the plain rules of reason."

The opinion (Rec. p. 214) definitely states that the "*burden was upon the plaintiff* to prove that Rice did not have a domicil in Reno, and that therefore the Nevada court had no jurisdiction." Whether the Referee's conclusion was one correctly drawn from the subordinate facts was a question of law. The subordinate facts as found by the trial court are not complained of. The trial court concluded from these subordinate facts that the plaintiff *had sustained her burden of proof* that no domicil had been acquired in Nevada. The only basis for the appellate court to disturb such a conclusion would be on the ground that it was illegally or illogically arrived at from the subordinate facts.

In stating this to be the law, the Connecticut court in no way shifted the original burden of proof from the plaintiff to the defendant, but was only stating the law under which the present petitioner could attack the conclusion of the trial court.

IV

Finding That Rice Went to Reno for the Sole Purpose of Obtaining a Divorce is Supported by All of the Evidence

For direct affirmative evidence as to Rice's reason for going to Nevada, we refer to the testimony of the petitioner herself appearing on page 173 of the Record. After first stating that it was the early part of February, 1944, when she first learned that Rice was going to Reno, she then testified as follows:

> "Q. From whom did you learn it? A. From Mr. Rice himself. Q. In that conversation, if you can remember it, what did he say about going to Reno? A. He said that he had spoken to an attorney in Springfield. Q. Did he give you the attorney's name? A. Yes, sir a Mr. Gerald Callahan. Mr. Callahan *told him to go out to Reno to get a divorce.*
> "

Again on page 175 of the Record, petitioner's counsel, in addressing a question to her, used the following language:

> "Q. When Mr. Rice told you sometime in February, 1944, that *he was going to Reno for the purpose of getting a Divorce*
> "

In the deposition of Mrs. Matson at page 162 of the Record, Mrs. Matson, in answer to a question as to circumstances under which she became acquainted with Mr. Rice, replied as follows:

> "He came to my house for a room. *He came to get a divorce.*"

There is plenty of other evidence from which proper inferences may be drawn showing that divorce was the sole motive for the trip

to Nevada. It appears from the deposition of Attorney McLaughlin (Rec. p. 51) that he first became acquainted with Herbert N. Rice on March 23, 1944, *the very day of his arrival in Reno:*

"Q. What were the circumstances under which you became acquainted with him? A. He arrived at my office and retained me to represent him in a divorce action."

On pages 109 and 110 of the Record is the respondent's testimony showing that after Rice left for Reno in March, 1944, she received by mail from Springfield, Mass., each week for a period of six successive weeks a check for $15.00 signed by Mr. Rice, each check being dated March 16, 1944. It is significant that he made this arrangement for the support of his first wife only for the period of six weeks, which was the residential period required under the Nevada law before a divorce action could be instituted.

Again on page 174 of the Record appears the testimony of the petitioner regarding the code telegram which Rice was to send her if he secured his divorce.

Even if there was evidence to the contrary, the foregoing evidence would entirely justify a finding that divorce was the sole motive for Rice's going to Nevada. Emphasis is given to all of this evidence by reason of the fact that no evidence whatsoever to the contrary was presented. No claim was made that he went to Reno for reasons of health, or business, or because he was attracted to the place for any reason other than its easy divorce laws.

Petitioner argues on page 12 of her brief that the finding of the Referee as to motive was based solely on disbelief of contrary statements made by Mr. Rice. We challenge petitioner to point out anywhere in the evidence one single statement by Rice, or any other evidence to the effect that he went to Reno for any purpose other than that of obtaining a divorce.

We have repeatedly stated throughout this case that we make no claim that a person's motive in acquiring a new home is con-

clusive on the question of domicil, or that a motive to avail oneself of the more liberal divorce laws of a State would necessarily prevent the acquisition of a new domicil. We do, however, claim, in the language of *Gildersleeve* vs. *Gildersleeve*, 88 Conn. 689, 694 "these considerations are indeed pertinent to the question of the *good faith* character of the change of abode." See also *State* vs. *Cook*, 110 Conn. 348, 351.

In *Nelson on Divorce, paragraph* 21.17 the following statement appears:

> "Motive may be immaterial in the court of first instance and other courts of the state in which the divorce is sought, particularly if it is a come hither divorce state, but it is clearly one of the factors considered when the validity of the divorce they grant comes in question elsewhere."

In *Hall* vs. *Hall*, 199 Miss. 478, a case cited in petitioner's brief, the following appears at page 490 of the opinion:

> "An intent to acquire permanent residence so as to qualify one for divorce proceedings may well be belied by making the latter predominate. Accent is shifted from that which is the means to that which constitutes the end."

On page 15 of petitioner's brief appears a most original argument. It is first stated that since the decedent's presence in Nevada is undisputed, the only ultimate fact left to be found is his state of mind when he went to Nevada or while he was there. Petitioner therefore concludes that a statement that he went there for the sole purpose of obtaining a divorce is the equivalent of a statement that his domicil was not changed. Although this contradicts the claim previously made that motive is immaterial, apparently such argument is resorted to in order to make it appear that the Connecticut court has attempted to dispose of the constitutional claim by casting it in the form of an unreviewable finding of fact. We have already pointed out that we do not claim, nor did the Connecticut court hold, that decedent's motive was controlling, but only that it was *material on the question of his good faith*.

V

The Ultimate Conclusion of the Connecticut Supreme Court of Errors is Supported by the Evidential Facts and the Proper Inferences Therefrom

Petitioner's entire argument is based on the proposition that the only material evidence consists of statements and conduct of Mr. Rice subsequent to the moment of his departure for Nevada. Although we by no means concede this, let us briefly summarize the evidence from the moment Mr. Rice boarded the train for Reno on March 19, 1944, with his domicil admittedly existing in Connecticut for many years prior thereto.

1. On March 23, 1944, Rice arrived in Reno and rented a room at Mrs. Matson's, to whom he apparently stated on that day that he had come to Nevada "to get a divorce." (Rec. p. 162.)

2. This room consisted of a bedroom about 10 ft. x 12 ft. or 12 ft. x 14 ft. in size. (Rec. p. 196.)

3. On March 23, 1944 the day of his arrival in Reno Rice consulted an attorney to whom he stated on that day that "he wanted a divorce." (Rec. p. 51.)

4. On March 23, 1944 the Reno attorney explained to Mr. Rice that it would be necessary for him to reside in Reno for a period of forty-three days before the court would accept his complaint in a divorce action. (Rec. p. 52.)

5. The complaint in the divorce action instituted by Rice in Reno was dated May 5, 1944, exactly forty-three days after his arrival in Reno. (Report of State Ref. Par. 5, Rec. p. 6.)

6. On March 25, 1944: Rice secured employment at the Reno Army Air Base, Reno, Nevada, and continued at such employment until July 2, 1944, at which time he resigned from said employment. (Rec. p. 145.)

7. A few days before the entry of the divorce decree Rice consulted his attorney for a second time and informed him that he had made application for employment in the government service in Herlong, Cal. (Rec. p. 52.)

8. On June 13, 1944, thirty-two days after service of the divorce complaint on the respondent on May 12, 1944, an ex parte divorce decree was entered by the Nevada court in which action the present respondent did not appear.

9. Immediately after securing his divorce, Rice notified the present petitioner by a code telegram that he had secured his divorce and asked her to come to Reno and marry him. (Rec. p. 174.)

10. The petitioner arrived in Reno on July 3, 1944; and on the same day she and Mr. Rice were married. (Rec. pp. 177, 178.)

11. After their honeymoon Mr. Rice and the Petitioner on July 15, 1944, took up their residence in Herlong, Cal., where Mr. Rice had secured *the employment which he had applied for prior to securing his divorce*, and the parties continued to reside in Herlong, Cal., until Mr. Rice's death on December 23, 1944. (Rec. p. 145.)

12. The petitioner caused to be shipped to Herlong, Cal., certain household furniture which she owned, and after said shipment arrived, said furniture was used to furnish the quarters in which the petitioner and Mr. Rice resided. (Rec. p. 195.)

13. After moving to Herlong, Cal., Rice continued to pay rent for the room which he had previously rented in Reno, Nevada, but *at a reduced rate per week*. (Rec. p. 167.)

14. During the period of Rice's residence in Herlong, Cal., this rented room in Reno was *occupied by others and the door to the same was unlocked*. (Rec. pp. 168-70.)

15. At infrequent intervals Rice and his new wife occupied said rented room in Reno, occasionally on weekends. (Rec. p. 168.)

16. The reason why Rice continued to pay rent for the room in Reno was because he did not know whether his job in Herlong would be permanent, or whether he and his wife would like it there. (Rec. p. 181.)

17. Although Rice and his new wife may have intended to go to Reno at some time in the future if they could find the sort of house that they desired, they never did find "any house there that was available for that sort of thing." (Rec. p. 185.)

To counterbalance the evidence of all of this conduct on the part of Mr. Rice, we are confronted only by a few self-serving declarations which the evidence discloses Rice made to other parties in Reno, all of which statements were made *after he had consulted his Reno attorney and learned the requirements for a Nevada divorce.* If these statements are taken at their face value, they amount to very little and show at best only a possible intention to make a home in Reno some time in the future if circumstances warranted. To Mr. Eddy, a casual friend, he stated that he "*wanted* to make a home in Nevada." (Rec. p. 147.) He stated that he "*intended* to enter business." (Rec. p. 148.) After going to California, he stated to Mr. Eddy that he *planned* to "go back into Reno into business of some kind if possible." (Rec. p. 155.)

Ignoring entirely all evidence of contradictory statements made by Rice before departing for Reno, we have only these few self-serving declarations. The courts everywhere have frequently commented upon weight to be given such statements, particularly in connection with proof of domicil in actions involving divorce

In *Com. Ex-Rel. Meth* vs. *Meth*, 156 Pa. Super, 632, at p. 639, *the Court stated:*

> "Unless the courts are to be reduced to a state of juvenile naivete, they cannot be required to accept self-serving declarations which are wholly at variance with actualities evidenced by the conduct of the party out of whose mouth they came."

This court has expressed itself in forceful language on the same point in *District of Columbia* vs. *Murphy*, 314 U. S. 441. We quote from page 456 of the opinion:

> "One's testimony with regard to his intention is of course to be given full and fair consideration, but is subject to the infirmity of any self-serving declaration and may frequently lack persuasiveness or even be contradicted or negatived by other declarations and inconsistent acts."

Obviously with no contradictory evidence appearing, it is a proper inference from the foregoing facts that Rice's sole motive in going to Nevada was to secure a divorce. Other inferences properly drawn certainly create more than a mere suspicion as to the good faith of Rice's pretended domicil in Nevada.

Without quibbling over the word "indefinite," and assuming that the Nevada court would construe this as synonymous with "permanent," the comment of the court in Mississippi in the case of *Hall* vs. *Hall (Supra)* is pertinent. We quote from page 490 of the opinion in that case:

> "In this connection, it is not inappropriate to say that while the Nevada courts hold that there must be a present intention to remain, if not permanently at least for an indefinite period, they likewise *view with indulgence* the evidence of such intent, but *cannot impose its standards* upon the courts of the State in which the contract of marriage was made and to which it remains always an interested and solicitous party."

When we are confronted with the undisputed fact that Rice, before securing his divorce, told his attorney that he had sought

employment outside of the State of Nevada, coupled with the fact that immediately after his divorce, he secured such employment, what credibility can be given to the statements of a man who, under oath, before the court in Nevada, testified that when he came to Nevada, he intended to reside there for an indefinite period, and then when questioned by the court, "Has that intention been continuously with you since that time" answered "yes," and in response to the court's question, "Is it your present intention," answered "Yes." (Rec. p. 48.)

At the very best, if we take all of Rice's self-serving statements to his Reno acquaintances at their face value, they only show an *intention* to make a home in Nevada at some time *in the future*.

In *Restatement of the Law, Conflict of Laws, Section* 19, we find the following:

> "The intention required for the acquisition of a domicil of choice is an intention to make a home in fact and not an intention to acquire a domicil."

Section 20 reads as follows:

> "For the acquisition of a domicil of choice the intention to make a home must be an intention to make a home *at the moment*, not to make a home *in the future*."

In *Mills* vs. *Mills*, 110 Conn. 612, the court at page 618 uses the following language:

> "The residence of the parties in Nevada with the intention of remaining there permanently after Mills should secure a divorce, *if he could find work*, did not operate to establish for him a domicil in Nevada. This principle is well established."

We have never claimed as petitioner seems to believe, that the employment and residence in California constituted the acquisition of a California domicil, but we do claim that if, as argued by petitioner, these facts are insufficient to support a new domicil in California, the same set of circumstances fail to constitute a new

domicil in Nevada. In other words we contend that it is a fair inference for the court to draw from such a set of facts that as in the cases of *Dalton* vs. *Dalton (supra)* and *Commonwealth* vs. *Berfield (supra)*, the only motive that influenced the decedent in remaining out of Connecticut in a foreign State *after* securing his divorce was profitable *employment in our work* and not domiciliary intent.

In the case of *Esenwein* vs. *Penn*, 325 U. S. 279 the defendant's former home was in Pennsylvania. After going to Reno, Nevada, and securing a divorce, he moved within a month to Cleveland, Ohio, where he was residing at the time of the suit. The Pennsylvania Supreme Court held that this fact alone was sufficient for a prima facie inference that notwithstanding his testimony to the contrary, he had no intention of making his domicil in Nevada. This court, in reviewing the Pennsylvania court's decision, stated that Pennsylvania recognized the burden resting upon the plaintiff. The opinion in that case at page 281 of 325 U. S. used the following language:

> "The Pennsylvania courts have viewed their constitutional duty correctly. It is not for us to retry the facts and we cannot say that in reaching their conclusion the Pennsylvania courts did not have warrant in evidence and did not fairly weigh the facts."

We shall not attempt to review further all of the facts in the case before us, as we can conceive of no better analysis of the significant evidence than is contained in the opinion of the Connecticut Supreme Court of Errors on pages 215 and 216 of the Record.

In the second of the *Williams cases (supra)*, at page 234 of the opinion, it is stated that this court will not upset the judgment of the State court

(1) If it gave proper weight to the claims of power by the foreign State in rendering a judgment.

(2) If the burden of overcoming such respect by disproof of domicil was properly charged against the party challenging the legitimacy of the judgment.

(3) If such issue of fact was left for fair determination by appropriate procedure.

(4) If a finding adverse to the necessary foundation of the foreign State judgment was amply supported in evidence.

We respectfully submit that an examination of the entire Record conclusively shows that the Connecticut Supreme Court of Errors meticulously met all four of these requirements and that its judgment should be affirmed.

Respectfully submitted,

RALPH H. CLARK,
SAMUEL A. PERSKY,
Counsel for the Respondent.

All italics in this Brief are ours.